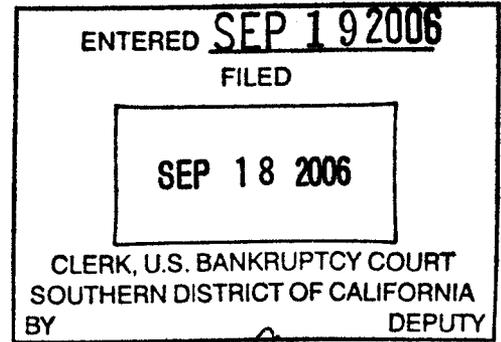


WRITTEN DECISION NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 05-12631-B7
12 ENRIQUE BARRAGAN and)
13 FELICITAS BARRAGAN,)
14 Debtors.)

15 In re) Case No. 05-12655-B7
16 RAFAEL MEZA-SOBERANIS,) ORDER ON DEBTOR'S MOTION
17 Debtor.) TO VACATE ORDER OF
18) DISMISSAL

19 These cases present a troubling set of circumstances and are
20 not, unfortunately, isolated instances. Debtors seek to vacate
21 the court's order of dismissal of their Chapter 7 cases, which
22 was precipitated by the failure of both debtors and their
23 attorney to appear for the noticed meetings of creditors.

24 The Court has subject matter jurisdiction over these
25 proceedings pursuant to 28 U.S.C. § 1334 and General Order
26 No. 312-D of the United States District Court for the Southern

1 District of California. These are core proceedings under
2 28 U.S.C. § 157(b) (2) (A), (O).

3 The basic facts are uncontroverted. On October 13, 2005,
4 just days before the bulk of the provisions of BAPCPA were to
5 take effect, attorney David Turaski filed three bankruptcy
6 petitions in this district: the instant case, Barragan;
7 Soberanis (05-21655); and Meza (05-12663). At the time he did
8 so, Mr. Turaski was not admitted to practice in the Southern
9 District of California, which may have contributed to the ensuing
10 problems (he finally obtained admission on May 9, 2006).

11 On the filing date, October 13, the Clerk's Office caused to
12 be issued, served, and filed a "Notice of Chapter 7 Bankruptcy
13 Case, Meeting of Creditors, & Deadlines" (Form B9A). Among other
14 things, the Notice advised that the meeting of creditors in
15 Barragan would be held November 22, 2005 at 4:15 p.m. in San
16 Diego. For Soberanis, the meeting was set for November 22, at
17 8 a.m. in San Diego. And for Meza, it was also set for 8 a.m. on
18 November 22.

19 In a separate, and distinctively captioned section of the
20 Notice, called "Dismissal of Case", the Notice stated in relevant
21 part:

22 Furthermore, notice is given that . . .
23 if the Debtor or Joint Debtor fails to appear
24 at the scheduled § 341(a) meeting that the
25 Trustee or U.S. Trustee will move for
26 dismissal of case without further notice to
the Debtor or Creditors. A party in interest
may object to the motion for dismissal at the
§ 341(a) meeting, at which time a hearing on
the objection will be scheduled.

1 The short of it is that neither the debtors nor Mr. Turaski
2 appeared at any of the three meetings of creditors. Having
3 failed to so appear, and consistent with the foregoing Notice,
4 the trustee in each of the three cases submitted an order
5 dismissing. In Barragan, the order was entered November 29. In
6 Soberanis, it was entered December 5, and in Meza it was entered
7 November 29.

8 In Barragan and Soberanis, nothing happened of record until
9 March 16, 2006, when Mr. Turaski filed a motion to reopen the
10 case. However, in Meza he filed a motion to vacate the dismissal
11 on January 24, 2006. That motion was denied without prejudice by
12 Judge Hargrove pending a motion to reopen, which was also filed
13 on March 16.

14 In support of the January motion in Meza, Mr. Turaski
15 submitted an affidavit in which he stated that he "was not able
16 to attend the debtor's 'First Meeting of Creditors' because of a
17 scheduling conflict, which required that I attend an initial
18 'meeting of Creditors' in another location . . ." He referenced
19 an Exhibit A, which was a Form B9A issued by the Clerk's Office
20 in the Central District of California in a case named Payes.
21 That meeting of creditors was set for November 22 at 9 a.m. in
22 Los Angeles. Of note, the Notice was not issued until October
23 25, 2005, twelve days after the notices issued in the three San
24 Diego filings.

25 There are several other items of note in the January filing
26 in Meza. First, in the motion itself (but not in the

1 declaration) Mr. Turaski says he called the trustee after the
2 date of the meeting (and apparently after receipt of the order of
3 dismissal because the trustee told him to file a motion to
4 vacate). The second item is that Mr. Turaski complains in the
5 motion of a denial of procedural due process because there was no
6 hearing on the trustee's motion to dismiss. It seems clear that
7 Mr. Turaski never read the Notice of meeting of creditors, or at
8 least the separate section on dismissal of a case. It seems
9 equally clear he did not read the published Bankruptcy Local
10 Rules for the Southern District of California because if he had,
11 he would have read BLR 2002-2(a)(1), which provides in relevant
12 part:

13 The noticing requirements of Fed. R. Bankr.
14 P. 2002 and this subsection are satisfied by
15 including the notice of intended action
 within the § 341(a) meeting notice

16 As Mr. Turaski recognized in his papers, dismissal requires
17 notice and an opportunity to be heard. Section 102 of Title 11
18 makes clear that "after notice and a hearing" requires notice and
19 an opportunity to be heard. Mr. Turaski and each of his clients
20 were given notice on or about October 13, 2005 that a failure to
21 appear at the § 341(a) meeting could result in dismissal without
22 further notice, and if someone wanted to object to dismissal they
23 needed to do so by the § 341 meeting, in which case it would be
24 set for hearing. Mr. Turaski, and each of his clients had from
25 October 13 to and including November 22 to object to dismissal,
26 obtain a continuation of the § 341 meeting - to do something to

1 avoid dismissal. In so far as the record reveals, nothing was
2 done about the § 341 appearance until after each of the three
3 cases were dismissed. Each of the debtors clearly had timely
4 notice and an opportunity for hearing, but failed to do anything
5 to preserve their cases, even if it was just to call the
6 respective trustees.

7 Mr. Turaski has argued that the notice of the possibility
8 of dismissal for failure to appear at the § 341(a) was
9 constitutionally infirm. In doing so, he relies on Dinova v.
10 Harris, 212 B.R. 437 (2d Civ. BAP 1997). To the extent Dinova's
11 discussion is apposite, this Court disagrees. So does the
12 Bankruptcy Appellate Panel for the Ninth Circuit in In re
13 Tennant, 318 B.R. 860, 870-71 (2004). The notice given to
14 Mr. Turaski and to his clients in Barragan and Soberanis was
15 clear, separately set out, and afforded plenty of time to avert
16 the consequences. It passes constitutional muster, as Tennant
17 makes clear.

18 The Court is also puzzled about Mr. Turaski's choice of
19 options. He had three § 341(a) appearances set for San Diego on
20 November 22, two at 8 a.m. and one at 4:15 p.m. He had one
21 § 341(a) set for Los Angeles on the same date at 9 a.m. He chose
22 the one over the three, even though the one was noticed twelve
23 days after the three in San Diego. It would seem Los Angeles is
24 closer to his home and office, and it might be easier to
25 reschedule one than ignore the three in San Diego. When asked at
26 the hearing why he did not appear in San Diego in the afternoon

1 of November 22 for the Barragan § 341 meeting, Mt. Turaski told
2 the Court that he had the continuation of a state court trial
3 carried over to that afternoon. He said he told the state court
4 he had a conflict in the morning (which was the Payes § 341
5 meeting, set 12 days after the San Diego meetings were set).
6 Nothing about that state court trial appears anywhere in the
7 written record or declarations, and it remains curious that he
8 would tell the state court he had a conflict in the morning for
9 Payes, but not tell the court he had a conflict in the afternoon
10 in San Diego, especially since he had known of that conflict much
11 longer.

12 For all that was set out in the filing in January in Meza,
13 including the questions it raises, no such motions were filed in
14 Barragan or Soberanis at that time. Finally, on March 16, 2006,
15 three and one-half months after the cases had been dismissed,
16 Mr. Turaski filed motions to reopen in all three cases. In
17 support, he submitted a brief declaration that simply said that
18 he told his client not to attend because he could not attend
19 since he had another matter to appear on elsewhere.

20 In Barragan, this Court denied the motion to reopen.
21 Mr. Turaski resubmitted his proposed order, which this Court
22 denied again because there was no explanation of the delay
23 between November 29, 2005 and March 16, 2006. In Soberanis, the
24 first motion was denied. Then Mr. Turaski filed motions for
25 reconsideration in both cases, they were set for hearing, and
26 ultimately granted without opposition from the trustees.

1 In the motions for reconsideration to reopen, Mr. Turaski
2 explained that he was tied up in a trial from the "beginning of
3 December 2005, until the case terminated, in late February 2006."
4 While he references the January motion to vacate, that motion was
5 only filed in the Meza case, not in Barragan or Soberanis. He
6 asserted, however:

7 In the instant case, debtor's counsel
8 was not able to file his motion until
9 approximately 3.5 months after the closure of
debtor's case, because debtor's counsel was
involved in a wrongful death civil action
. . . .

10 . . . Therefore, after complete
11 resolution of the aforementioned state civil
12 case, debtor's counsel promptly acted to file
13 a motion in the U. S. Bankruptcy Court,
Southern District of California, so as to
14 seek relief from the closure of debtor's
case.

15 Mr. Turaski argued a number of points which he contended
16 supported reopening, but many are inapposite in the present
17 context. Congress designed a Chapter 7 process with short
18 deadlines for meetings of creditors and filing objections to
19 discharge or dischargeability, specifically intended to provide
20 debtors with a prompt discharge and fresh start. In these cases,
21 those goals have been frustrated by the delays occasioned by
22 counsel, through no apparent fault of the debtors.

23 After finally obtaining a reopening of the cases,
24 Mr. Turaski filed on July 17, 2006 the present motions to vacate
25 the orders of dismissal entered seven and one-half months
26 earlier. No one has objected in the Soberanis case, but the

1 Chapter 7 trustee, Ms. Wolf, has objected in Barragan.

2 Trustee Wolf points out in her opposition that the debtors
3 have not done most of what they were supposed to do, including
4 providing to the trustee not less than 15 days before the
5 § 341(a) meeting "written documentation supporting income
6 earnings" listed in Schedule I, a requirement clearly set out in
7 the Notice, Form B9A. The trustee argues that the estate
8 suffered some prejudice because the estate was unable to protect
9 possible equity in the debtor's vehicle because the debtors did
10 not provide proof of insurance of the vehicle as required.

11 Mr. Turaski responded to the trustee's opposition,
12 contending that the trustee should be estopped from objecting
13 because the trustee did not return his call to ask the trustee
14 whether she needed additional information and whether she "would
15 be scheduling a hearing to dismiss their case." He claims in the
16 document that the call was in November, which is curious since
17 the § 341(a) was not until November 22 and dismissal followed a
18 week later. There is no supporting declaration concerning any
19 such phone call.

20 In her opposition, the trustee also noted that in the state
21 case which had Mr. Turaski tied up through the end of February,
22 the state court order approving the minor's compromise reflects
23 that the hearing on approval was held on January 31, 2006.
24 In his written response, Mr. Turaski contended there were
25 administrative matters which consumed the month of February and,
26 inconsistently, he stated:

1 c. And the fact that during the month
2 of February 2006, both defense counsel,
3 Mr. John Kristiansen, and the Superior Court
4 judge, Commissioner Mahlum, both went on
5 vacation at different times during the month.

6 The apparent implication of that statement is that things could
7 not get done because of the absence of one or the other. That
8 would seem to suggest the notion that there was time in February
9 to address these cases precisely because the state court
10 settlement could not advance.

11 Despite repeated efforts to shift responsibility for his own
12 decisions about where to be, whether to address or ignore his
13 scheduling priorities, and leave his clients open to dismissals,
14 the last paragraph of his response is scandalous, outrageous and,
15 so far, wholly unsupported. In it, he stated:

16 Finally, it appears that the subtext
17 behind all of the Chapter 7 Trustee's
18 objections is really discrimination and
19 dislike of "people of color," i.e., [sic] the
20 debtors in the instant case. Rather, than
21 using the law as a cudgel to attempt to
22 deprive the Latin-American debtors of their
23 rights under the Bankruptcy Code, the Chapter
24 7 Trustee's interests would be better served
25 by adherence to the law, and principles of
26 equity.

27 In over eighteen years on the bench in this district, no one has
28 ever made such an assertion about trustee Wolf or her counsel to
29 the Court. Moreover, it is puzzling to imagine what basis
30 Mr. Turaski might have to make such a bald assertion since by his
31 own unsworn claims his only communication with the trustee was a
32 voicemail message he left and that was not returned.

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1 While it is an issue collateral to the underlying motion,
2 and while the trustee has not directly addressed it (nor was
3 there an occasion to other than oral argument since it was first
4 raised in Mr. Turaski's response to the trustee's opposition),
5 the Court will not allow such an accusation to lay on the record
6 unresolved because such an allegation can taint the entire
7 process, especially in the minds of Mr. Turaski's clients.
8 Accordingly, Mr. Turaski is hereby ordered to file and serve
9 within twenty-one (21) days of the date of entry of this order
10 either: 1) his declaration and any supporting declarations or
11 documents, or any other evidence he has which supports such an
12 allegation; or 2) a written apology to trustee Wolf stating that
13 he has no knowledge or other basis to support that allegation.
14 If Mr. Turaski invokes the first option, the Court will
15 thereafter determine how it will proceed.

16 Mr. Turaski's motion to vacate the order of dismissal in
17 both this case and Soberanis raises some interesting questions
18 which neither side has directly addressed. As already noted,
19 Mr. Turaski separately pursued motions to reopen, which were
20 unopposed and ultimately granted for that reason. In pursuing
21 reopening, Mr. Turaski invoked 11 U.S.C. § 350(b), which
22 provides: "A case may be reopened in the court in which such case
23 was closed to administer assets, to accord relief to the debtor,
24 or for other cause." While on its face § 350 might seem
25 applicable to these cases which were closed after dismissal,
26 review occasioned by these proceedings has made clear that § 350

1 is not applicable to cases which were dismissed without
2 administration of the then-known estate. Section 350 is aimed at
3 estates that have been fully administered, as § 350(a) makes
4 clear.

5 The courts that have considered the question, including the
6 Ninth Circuit Court of Appeals, have concluded that § 350 does
7 not apply to dismissal cases, and that the standards of Rule
8 60(b) made applicable by Rule 9024, Fed. R. Bankr. P.) control
9 whether relief should be afforded. In re Income Property
10 Builders, Inc., 699 F.2d 963, 965 (9th Cir. 1982); In re Archer,
11 264 B.R. 165, 168 (Bankr. E.D. Va. 2001); In re Critical Cave
12 Support Services, 236 B.R. 137, 140-41 (E.D. NY 1999); In re
13 Woodhaven, Ltd., 139 B.R. 745, 747-48 (Bankr. N.D. AL 1992); In
14 re Garcia, 115 B.R. 169, 170 (Bankr. N.D. IN 1990).

15 Rule 60(b) provides in relevant part:

16 On motion and upon such terms as are
17 just, the court may relieve a party . . .
18 from a final judgment, order, or proceeding
19 for the following reasons: (1) mistake,
20 inadvertence, surprise, or excusable neglect;
21 (2) newly discovered evidence . . .; (3)
fraud . . .; (4) the judgment is void; (5)
the judgment has been satisfied . . .; or (6)
any other reason justifying relief from the
operation of the judgment. The motion shall
be made within a reasonable time . . .

22 It is apparent that reasons (2), (3), (4) and (5) have no
23 applicability to the present situation. Mr. Turaski has offered
24 no showing of "mistake, inadvertence, surprise, or excusable
25 neglect". As in Garcia, 115 B.R. at 170-71, debtors and their
26 counsel were clearly advised in the B9A Notice that failure to

1 appear at the meeting of creditors could result in dismissal
2 without further notice, and were also advised if they wanted to
3 contest dismissal they should do so at the § 341 and it then
4 would be set for hearing. Neither Mr. Turaski nor his clients
5 did anything to avert dismissal. There has been no showing of
6 mistake, inadvertence, or surprise. Excusable neglect requires
7 some sort of showing, although as the Supreme Court made clear in
8 Pioneer Invest. Svcs. Co. v. Brunswick Associates Ltd. P'ship,
9 507 U.S. 380, 395 (1993):

10 [T]he determination is at bottom an equitable
11 one, taking account of all relevant
12 circumstances surrounding the party's
13 omission. These include . . . the danger of
14 prejudice to the debtor, the length of the
15 delay and its potential impact on judicial
16 proceedings, the reason for the delay,
17 including whether it was within the
18 reasonable control of the movant, and whether
19 the movant acted in good faith.

20 In the instant case, Mr. Turaski has argued that the debtors
21 did nothing wrong and, while not conceding that he made any
22 mistakes, they should not suffer the consequences of dismissal.
23 The court of appeals in Pioneer had taken a similar view, which
24 the Supreme Court thereafter considered. The Supreme Court
25 wrote:

26 There is one aspect of the Court of
Appeals' analysis, however, with which we
disagree. The Court of Appeals suggested
that it would be inappropriate to penalize
respondents for the omissions of their
attorney, reasoning that "the ultimate
responsibility of filing the . . . proof[s]
of clai[m] rested with [respondents']
counsel." Ibid. . . .

1 In other contexts, we have held that
2 clients must be held accountable for the acts
3 and omissions of their attorneys. In Link v.
4 Wabash R. Co., 370 U.S. 676 . . . (1962), we
5 held that a client may be made to suffer the
6 consequence of dismissal of its lawsuit
7 because of its attorney's failure to attend a
8 scheduled pretrial conference. In so
9 concluding, we found "no merit to the
10 contention that dismissal of petitioner's,
11 claim because of his counsel's unexcused
12 conduct imposes an unjust penalty on the
13 client." (Citation omitted.) To the
14 contrary, the Court wrote:

"Petitioner voluntarily chose this
attorney as his representative in the
action, and he cannot now avoid the
consequences of the acts or omissions of
this freely selected agent. Any other
notion would be wholly inconsistent with
our system of representative litigation,
in which each party is deemed bound by
the acts of his lawyer-agent and is
considered to have 'notice of all facts,
notice of which can be charged upon the
attorney.'" (Citation omitted.)

15 507 U.S. at 396-96. The Court concluded:

This principle applies with equal force here
and requires that respondents be held
accountable for the acts and omissions of
their chosen counsel. Consequently, in
determining whether respondents' failure to
file their proofs of claim prior to the bar
date was excusable, the proper focus is upon
whether the neglect of respondents and their
counsel was excusable.

21 507 U.S. at 397.

22 As already discussed, Mr. Turaski's sole argument in the
23 pending motions to vacate is that his clients were denied due
24 process because the trustees did not schedule hearings on
25 dismissal. The Court has rejected that contention for the
26 reasons previously set out. Mr. Turaski has not focused on the

1 requirements of Rule 60(b) and in fairness to his clients he
2 should be afforded the opportunity to do so. Accordingly,
3 Mr. Turaski is ordered to file and serve a supplemental pleading
4 within twenty-one (21) days of the date of entry of this order.
5 That pleading shall: 1) advance any argument the debtors may have
6 under Rule 60(b) to support their requests that the dismissal
7 orders be vacated; 2) be accompanied in each case by a
8 declaration from Mr. Turaski addressing a) who paid the reopening
9 fee; b) whether the client has been asked to ultimately bear that
10 cost; and c) whether the clients have been asked by him to pay
11 any other attorneys fees and/or costs in these cases since
12 October 13, 2005. In the interim, the Court will retain
13 jurisdiction both to resolve the pending motions and to resolve
14 the allegation made against trustee Wolf, as discussed earlier.
15 Mr. Turaski is required to act in that matter within twenty-one
16 days of the date of entry of this order as well.

17 IT IS SO ORDERED.

18 DATED: SEP 18 2006

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20 
21 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court
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